

Zabate (Migration) [2019] AATA 3893 (30 July 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Judelyn Dayot Zabate

CASE NUMBER: 1835532

HOME AFFAIRS REFERENCE(S): CLF2018/13120

MEMBER: Moira Brophy

DATE: 30 July 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Child (Residence) (Class BT) visa.

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Statement made on 30 July 2019 at 12:19pm

CATCHWORDS

5. *MIGRATION – Child (Residence) (Class BT) visa – Subclass 802 (Child) – dependent child of an eligible person – dependency – ‘step child’ – child of former spouse or de facto partner – marriage declared null and void – non-genuine relationship – decision under review affirmed*

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65

Migration Regulations 1994 (Cth), r 1.03; Schedule 2, cl 802.212

- 6.

CASES

Huynh v MIMA [2006] FCAFC 122

- 7.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

8. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 29 November 2018 to refuse to grant the applicant a Child (Residence) (Class BT) visa under s.65 of the *Migration Act 1958* (the Act).
9. The applicant applied for the visa on 15 February 2018. At the time of application, the Child (Residence) (Class BT) visa contained Subclass 802 (Child) and Subclass 837 (Orphan Relative). In this case, claims have only been made in respect of Subclass 802 (Child).
10. The criteria for a Subclass 802 visa are set out in Part 802 of Schedule 2 to the Migration Regulations 1994 (the Regulations). As there is no letter of support from a State or Territory government welfare authority (cl.802.216, 802.226A), the criteria to be met in this case include cl.802.212.
11. The applicant, Ms Judelyn Dayot Zabate appeared before the Tribunal on 22 July 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Jeffery Smith.
12. The applicant was represented in relation to the review.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

14. Background

15. The applicant, Ms Judelyn Dayot Zabate is the biological child of Nova Wi Dayot and Pedro R Zabate. She was born in Manilla in 2000. A copy of her birth certificate is at f 39 of the Department file. On that birth certificate it is recorded that her parents were married on 31 July 1996.
16. Ms Zabate arrived in Australia on a Visitor visa on 31 March 2016 with her mother and younger sister Avery.
17. Her mother Nova Wi Dayot was married to Mr Jeffery Malcolm Smith (the sponsor) on 23 May 2016 at Registry of Births, Deaths and Marriages at Parramatta. On the Marriage Certificate Ms Dayot is recorded as having 'never validly married.'
18. On 21 June 2016 Ms Dayot lodged an application for a subclass 820 Partner (Temporary) (Class UK) on the basis of her being in a genuine and continuing relationship with the sponsor Mr Jeffery Smith. Ms Zabate was listed as a dependent secondary applicant.
19. On 2 January 2017 Ms Dayot withdrew her partner application and she departed Australia on 28 January 2017 with her younger daughter Avery. Ms Zabate remained in Australia.
20. On 27 January 2017 Ms Zabate lodged an application for a Child (Residence) (Class BT) Subclass 802 visa. Mr Jeffery Smith was named as the sponsor.
21. On 15 August 2017 the delegate refused that application under clause 802.212(1A) on the grounds the applicant was the dependent child of her mother and the sponsor, and her mother and the sponsor were in an ongoing relationship. Clause 802.212(1A) imposes an additional requirement that the delegate found was not met and that is that the step parent

the applicant claims to be a step child of must no longer be in the relationship with the applicant's parent, the applicant must be aged under 18 and the step parent holds parenting orders of the Family Court granting them parental responsibility or guardianship of the applicant at the time the application was made.

22. On 6 February 2018 Orders of the Family Court were issued giving joint custody to the sponsor and the mother of Ms Zabate with a further order that she reside with the sponsor.
23. On 15 February 2018 Ms Zabate lodged a fresh application for a Child (Residence) (Class BT) Subclass 802 visa. Mr Jeffery Smith was named as the sponsor.
24. On 29 November 2018 the delegate refused to grant the visa on the basis that cl.802.211 was not met because the applicant did not hold a substantive visa at the time of application and she had her previous application (made on 27 January 2017) refused, so she was subject to the additional requirements in section 48 of the Act. Accordingly she was required to have 'become' the dependent child of a person who was either the holder of a permanent visa, Australian citizen or eligible NZ citizen. The applicant was considered to have been the dependent child of her biological mother and step father at the time of her last substantive visa application and she therefore had not 'become' a dependent child since her last application.
25. The applicant seeks review of that decision in this application.

CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issue in this case is whether the applicant satisfies the definition of 'step child' and is therefore a child of the sponsor.

Dependent child criteria

27. The criterion in cl.802.212 essentially requires that at the time of application, the applicant is a 'dependent child' of an eligible person, and is under 25 years of age or incapacitated for work. These requirements must continue to be met at the time of decision, or if they are not met, it is only because the applicant has turned 18 (or if already 18, only because the applicant has turned 25): cl.802.221(1) or (2)(a).

Dependent child

28. At the time of application, the applicant must be a 'dependent child' of an Australian citizen, permanent visa holder, or eligible New Zealand citizen: cl.802.212(1)(a). 'Dependent child' is defined in r.1.03 of the Regulations, which is extracted in the attachment to this decision. Essentially, the child must not be engaged or partnered, and if 18 or older, must be reliant on the parent for financial support to meet certain basic needs, or be incapacitated for work due to loss of bodily or mental functions.
29. In this context, for there to be the necessary element of dependency, there need not be a necessity to provide the relevant support. The question to be addressed is whether, as a matter of fact, the first person is relying for support on the other person: *Huynh v MIMA* [2006] FCAFC 122 at [39], [44].
30. Ms Zabate gave evidence that she had resided in the home of her sponsor since she arrived in Australia. It was rented accommodation and he paid the rent. The sponsor, his partner and his son also resided at the house. Ms Zabate further told the Tribunal the sponsor bought the food for the household and while she was now working and able to meet some of her

personal needs such as clothing she was wholly or substantially dependent on the sponsor for her food and shelter and had been since the time of her arrival in Australia.

31. In this instance while the Tribunal is satisfied the sponsor has provided the applicant with food and shelter since she arrived in Australia because she was aged under 18 at the time of application the Tribunal is satisfied that that fact of itself means the applicant meets the definition of a dependent child.

Applicant under 25 or incapacitated for work

32. At the time of application, the applicant must not have turned 25. However, this requirement does not apply in the case of applicants who, at the time of making the application, were incapacitated for work due to the total or partial loss of bodily or mental functions: cl.802.212(1)(b), (2).
33. The Tribunal is satisfied that as at the time of application Ms Zabate was aged under 18. She was born in 2000 and the application was made on 15 February 2018. The Tribunal is satisfied the applicant is not incapacitated for work because of loss of bodily or mental functions.
34. Accordingly, cl.802.212(1)(b) is met at the time of application, and continues to be met at the time of decision.

Step-child

35. If the applicant is a step-child of the Australian citizen, permanent visa holder or eligible New Zealand citizen mentioned in cl.802.212(1), the applicant must be a step-child within the meaning of paragraph (b) of the 'step-child' definition in r.1.03, which is extracted in the attachment to this decision: cl.802.212(1A).
36. A step child, in relation to a parent, means:
 37. (a) a person who is not the child of the parent but who is the child of the parent's current spouse or de facto partner; or
 38. (b) a person who is not the child of the parent but:
 39. (i) who is the child of the parent's former spouse or former de facto partner; and
 40. (ii) who has not turned 18; and
 41. (iii) in relation to whom the parent has:
 42. (A) a parenting order in force under the Family Law Act 1975 under which the parent is the person with whom a child is to live, or who is to be responsible for the child's long-term or day-to-day care, welfare and development; or
 43. (B) guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.
44. The issue for the Tribunal was whether the applicant was in fact the child of the parent's former spouse or former de facto partner. While the delegate had determined the issue on dependency the Tribunal considered the preliminary issue to be whether the applicant was

able to meet the definition of a 'step child.' This issue was raised with the parties at the time of hearing.

45. The Tribunal carefully considered the evidence given at hearing.
46. The applicant told the Tribunal she had come to Australia with her mother and sister. She had met the sponsor once prior to her coming to Australia. She had met him at the apartment she was living in with her mother and sister in Manila. She said prior to coming to Australia her mother had been in a relationship with an American man who was the father of her younger sister. She said it was a volatile relationship. He had been in America at the time they left for Australia and only learned they had gone when he returned. He was very angry and wanted them back especially his daughter Avery. The applicant said she had told the sponsor about this relationship and also the fact her mother had been married to her father. She said she took this step because she considered it unfair that he was not aware of what her mother had done. When asked when she had told the sponsor the applicant said it was prior to her mother leaving Australia. She was uncertain as to when it was but thought it was about two weeks before her mother left. She said her mother had been very angry with her for telling the sponsor of her other relationships. Her mother said the applicant had 'ruined all her plans.'
47. The sponsor told the Tribunal he had met the applicant's mother online in 2014 and after initial contact he had met her in person in the Philippines. He said she came to Australia to visit him on a visitor visa and in March 2016 she had come again with both her daughters. The sponsor said they were married in May 2016. They had received advice that was the best course of action to obtain a visa. He said the applicant's mother changed after they were married. He said she became difficult. He considered he always had a good relationship with the applicant. He said she told him of her mother's marriage to her father and her relationship with her younger sister's father in December 2016. He said he had confronted Ms Dayot and he told her the relationship was over because she had been unfaithful. He said when he had learned she had previously been married he was confused as to what that meant for his marriage to her. He was especially concerned because he was a licensed investigator and any allegation he was involved in a fraud would impact on his licence. He said it took him a while to sort it all out. He obtained a copy of the marriage certificate from her first marriage in the Philippines from the applicant's biological father. He obtained that somewhere in the period between mid to late 2017. He was unsure as to exactly when. He said it was difficult to obtain official documents such as marriage certificates in the Philippines. He said his marriage to Ms Dayot was declared null and void in March 2019.
48. Section 5F of the Act provides a person is the spouse of another if they are in a married relationship. To be in a married relationship: they must be married to each other under a marriage that is valid for the purposes of the Act.
49. The Tribunal is satisfied Ms Zabate is not the child of her mother's former spouse as the marriage has been declared null and void.
50. As discussed with the parties at hearing the Tribunal must then consider whether she is the child of her mother's former de facto partner. For the relationship of the sponsor and Ms Dayot to be considered a genuine de facto relationship as defined in s.5CB of the Act the Tribunal must be satisfied the parties to the relationship are not married and they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family.

51. On the sponsor's own evidence he and Ms Dayot commenced their de facto relationship when she arrived in Australia in March 2016 and they commenced living together. Ms Dayot left Australia on 28 January 2017. The sponsor said the relationship was over in December 2016 when he learned of her other relationships. On the evidence given by the sponsor at the time of hearing and the uncontested evidence as to Ms Dayot's former marriage and relationship with the father of her younger child the Tribunal was not able to make a finding Ms Dayot and the sponsor had a mutual commitment to a shared life together to the exclusion of all others. The Tribunal was not satisfied that the relationship between them was genuine and continuing. In making this finding the Tribunal was mindful of the provisions of Reg. 1.09A(4).
52. Accordingly the Tribunal is not satisfied the sponsor is the former de facto partner of the applicant's mother.
53. That being the case the Tribunal is not satisfied the applicant is a 'step-child' (as defined in paragraph (b) of the r.1.03 definition) of the eligible person at the time of application or at the time of decision.
54. For the reasons above, the criteria in cl.802.212 are not met.
55. For the reasons above, the criteria for the grant of a Subclass 802 visa are not met. There have been no claims advanced in respect of the other visa subclass in Class BT (Subclass 837).

DECISION

56. The Tribunal affirms the decision not to grant the applicant a Child (Residence) (Class BT) visa.

Moira Brophy
Member

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ATTACHMENT – RELEVANT LAW

- **Migration Regulations 1994**

1.03 Definitions

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dependent child, of a person, means the child or step-child of the person (other than a child or step-child who is engaged to be married or has a spouse or de facto partner), being a child or step-child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
 - (i) is dependent on that person; or
 - (ii) is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions.

...

step-child, in relation to a parent, means:

- (a) a person who is not the child of the parent but who is the child of the parent's current spouse or de facto partner; or
- (b) a person who is not the child of the parent but:
 - (i) who is the child of the parent's former spouse or former de facto partner; and
 - (ii) who has not turned 18; and
 - (iii) in relation to whom the parent has:
 - (A) a parenting order in force under the *Family Law Act 1975* under which the parent is the person with whom a child is to live, or who is to be responsible for the child's long-term or day-to-day care, welfare and development; or
 - (B) guardianship or custody, whether jointly or otherwise, under a Commonwealth, State or Territory law or a law in force in a foreign country.

1.05A Dependent

- (1) Subject to subregulation (2), a person (the **first person**) is dependent on another person if:
 - (a) at the time when it is necessary to establish whether the first person is dependent on the other person:
 - (i) the first person is, and has been for a substantial period immediately before that time, wholly or substantially reliant on the other person for financial support to meet the first person's basic needs for food, clothing and shelter; and
 - (ii) the first person's reliance on the other person is greater than any reliance by the first person on any other person, or source of support, for financial support to meet the first person's basic needs for food, clothing and shelter; or
 - (b) the first person is wholly or substantially reliant on the other person for financial support because the first person is incapacitated for work due to the total or partial loss of the first person's bodily or mental functions.

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